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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 03 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.[1] The director also determined that the petitioner had not established its ability to pay the proffered wage as of the May 27, 2004 priority date and onward.

The petitioner substituted the instant beneficiary for [redacted] the original beneficiary on the certified ETA Form 750. The petitioner submitted its immigrant petition with the United States Citizenship and Immigration Services (USCIS) initially on July 13, 2007, with a later submission with the requisite $195 fee on July 16, 2007; however, the receipt date in USCIS is July 17, 2007. As of that date, substitution requests are no longer permitted according to 20 C.F.R. §§ 656.11 and 656.30(c).[2] Although the director did not comment on this issue in his decision, this is a

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[1] The director also noted that three years of undergraduate study and one year of work experience are not the equivalent of a four-year bachelor's degree. The AAO notes that the beneficiary possesses a three year bachelor's degree. The petitioner did not appeal this issue. Thus, the AAO will not address this issue in these proceedings. If the petitioner pursues this matter further under the EB3 visa preference classification, it will have to address any questions with regard to the beneficiary's qualifications and any proposed educational alternatives on the Form ETA 9089.

[2] We note that the case involves the substitution of a beneficiary on the labor certification. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and

valid ground for dismissing the petition. USCIS records also indicate that [redacted], the original ETA Form 750 beneficiary, adjusted status on July 17, 2007 based on another I-140 petition (SRC 06 151 52833) that the petitioner filed on April 14, 2006 and that was approved on May 24, 2006. If [redacted] is a lawful permanent resident, this petition is moot.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

On appeal, counsel asserts that its computer and Adobe systems have bugs in them, and that the EB2 visa preference classification was a typographical error. Counsel states that the petitioner's letter of support mentions that the petition was made for the third preference classification requiring a bachelor's degree.[4] Counsel requests a correction of the typographical error.

For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case does not predate the rule, substitution will not be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] The AAO notes that while the petitioner's cover letter's subject line refers to the EB3 visa preference classification, the first line of the same letter states that the petition is filed for the beneficiary as a member of a profession with an advanced degree.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.) While the director failed to cite this regulation, it provides the legal basis for his ultimate conclusion.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

> Block 14:
>
> Education:
>
> College: 4
>
> College Degree Required: Bachelor's *
>
> Major Field of Study: Computer Science **
>
> Experience: two years in job offered or related occupation of programmer analyst, systems analyst ***.

Block 15: * Employer deems 3 years of undergraduate study plus 1 year of experience in the field as equivalent to Bachelor's Degree
** Technology, CIS , MIS, Physics, Engineering (any field) or Mathematics.
*** Programmer, Developer, or Consultant

USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate or the foreign equivalent. The petitioner indicated that only a four-year bachelor's degree was required. Thus, the position does not require a member of the professions holding an advanced degree.[5] The AAO concurs with the director's denial of the petition on this ground.

Further, on appeal, counsel requests a change of classification for the instant petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The

[5] The AAO notes that no conclusion has been made with respect to whether the beneficiary meets the EB-3 classification as a professional based on his three year degree, or whether he meets the terms of the labor certification as approved by DOL which requires a four year degree.

correct recourse is to file a petition in the correct classification. The petitioner filed the instant petition in the wrong classification and this is a basis to dismiss the appeal standing alone.

The AAO will now examine the second issue raised by the director, whether the petitioner established its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

With the initial I-140 petition, the petitioner submitted IRS Forms 1120, U.S. Corporation Income Tax Return, for tax years 2004 and 2006, and its state of Kansas tax return for tax year 2005. The petitioner also submitted Forms 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2005. These documents reflect that the petitioner had 33 employees in the first quarter of 2005, and 44 employees in the second quarter.

The director determined that the petitioner had not submitted its 2005 federal tax return, and thus the petitioner could not establish its ability to pay the proffered wage in tax years 2004 through 2006. On appeal, the petitioner submits its 2005 and 2007 federal tax returns for the first time and resubmits its federal tax returns for 2004 and 2006. Counsel also submits a W-2 Form for the beneficiary for tax year 2007 that indicates he was paid $42,840. Counsel also submits a twenty-

seven page Wage and Tax Register for the petitioner's employees throughout the United States, dated March 31, 2008. This document indicates the beneficiary received wages of $19,784 as of that date. Finally counsel provides W-2 Forms for the original beneficiary of the certified ETA Form 750 for tax years 2004, 2005, 2006, and 2007.

On appeal, counsel reviews the USCIS analysis utilized in determining the petitioner's ability to pay the proffered wage based on its net current assets. Counsel provides a graph in which the petitioner's net income, current assets, current liabilities, the petitioner's total assets combined with its net income, and its retained earnings are identified for tax years 2004 through 2007. Counsel states that the petitioner's combined net current assets, net income, and retained earnings are more than the proffered wage. He also notes that the petitioner's net income always exceeded the proffered wage of $70,000.

Counsel also submits W-2 Forms for tax years 2004 to 2007 that the petitioner issued the original beneficiary. Counsel states that the petitioner paid the original beneficiary wages of $48,503 in 2004; $54,124 in 2005; $60,340 in 2006, and $25,060 for 2007.

Here, the Form ETA 750 was accepted on May 27, 2004. The proffered wage as stated on the Form ETA 750 is $70,000 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position or a related occupation

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $6 million dollars, and to currently employ 66 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on July 6, 2007, the beneficiary claimed to have worked for the petitioner as of July 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are a company's accumulated earnings since its inception less dividends. *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding

retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. *Id.* Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. *Id.* at 27. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

On appeal, the petitioner also submits the W-2 Forms for the original beneficiary for relevant tax years. The petitioner does not provide any explanation of the submission of these forms, nor does it propose to replace the original beneficiary with the present beneficiary. The petitioner's 2008 quarterly Wage and Tax Register reflects that [redacted] is still on the petitioner's payroll, as of March 3, 2008. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.. The AAO also notes that the petitioner did not pay the original beneficiary the proffered wage of $70,000 during these years.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided the

beneficiary's W-2 form for 2007 that indicates it paid the beneficiary a salary of $42,840. It also provides its Wage And Tax Register for the first quarter of 2008 that indicates it paid the beneficiary $19,784.50 as of March 31, 2008. It has not established that it employed and paid the beneficiary the full proffered wage from the 2004 priority date and onward. The petitioner thus has to establish that it has the ability to pay the entire proffered wage of $70,000 during tax year 2004 through 2006, and the ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay

wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 12, 2008 with the director's decision. As of that date, the petitioner's 2007 federal income tax return was due. On appeal, counsel submits this tax return to the record. The petitioner's tax returns demonstrate its net income for the relevant years, as shown in the table below.

- In 2004, the Form 1120 stated net income of $75,290.
- In 2005, the Form 1120 stated net income of $74,897.
- In 2006, the Form 1120 stated net income of $124,958.
- In 2007, the Form 1120 stated net income of $112,425.

Therefore, for the years 2004 to 2006, the petitioner did have sufficient net income to pay the proffered wage, and in 2007sufficient net income to pay the difference between the beneficiary's actual wages of $42,840 and the proffered wage of $70,000.

However, USCIS records either under [redacted] or [redacted] indicate that the petitioner has filed more than 425 petitions from 2001 to the present date, primarily I-129 petitions. In 2010, 40 petitions were filed, while approximately 86 petitions were filed in 2009. Under the spelling [redacted] the petitioner also filed 16 I-140 petitions in 2006. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the 2004 priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Thus the petitioner's net income does not appear sufficient to pay for the proffered wages of all I-140 petitions filed during tax years 2004 to 2007, as well as the prevailing wages for all I-129 petitions filed during that period.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds

available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for tax years 2004 to 2007, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of $11,180.
- In 2005, the Form 1120 stated net current assets of $141,391.
- In 2006, the Form 1120 stated net current assets of $64,510.
- In 2007, the Form 1120 stated net current assets of $89,754.

Therefore, for tax years 2005 and 2007, the petitioner did have sufficient net current assets to pay the proffered wage. However, as stated previously, the petitioner would also have to establish its ability to pay the proffered for all other I-140 petitions filed during the relevant period of time, and the prevailing wages for I-129 petitions.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. As previously discussed, the petitioner's retained earnings are not found to be accessible, and USCIS does not calculate the combined net income/net current assets when it examines the petitioner's ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612

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[6]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

(BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record contains no evidence with regard to the reputation of the petitioner within its industry. The record does indicate the petitioner was established in 1999 and began filing non-immigrant and immigrant petitions in 2001, two years after its establishment. With regard to the petitioner's Wage and Tax Register for the first quarter of 2008, if the petitioner's employees have similar job duties and similar proffered wages as the beneficiary, in numerous cases, the petitioner's employees are being paid on a quarterly basis less than the proffered wage annually. With regard to discretionary expenses such as officer compensation, the record indicates that the petitioner provided no officer compensation in tax years 2004 and 2005, while providing $52,200 in 2006 and $119,988 in 2007.

With regard to gross receipts, the petitioner's gross receipts have increased from $1,020,648 in 2004 to $4,156,605 in 2007. This increase appears to be closely correlated with the large number of non-immigrant I-129 petitions filed by the petitioner. The AAO finds that the petitioner's gross receipts by themselves are not sufficient to establish the petitioner's business viability. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.